
U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
525 Vine Street Suite 900
Cincinnati, OH 45202

OFFICIAL BUSINESS

DATE: 05 Feb 1988

CASE NO.: 88-ERA-3

IN THE MATTER OF

JAMES R. BARNETT
COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY
RESPONDENT

Appearances:

Pro Se
For the Complainant

Thomas F. Fine, Esquire
For the Respondent

Heard Before:
Robert L. Cox
Administrative Law Judge

RECOMMENDED DECISION & ORDER

This proceeding arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851, and regulations promulgated

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thereunder at 29 C.F.R. 24. Regulation section numbers mentioned in the Recommended Decision and Order refer to sections of that Title. The Act prohibits, among other things, a Nuclear Power Commission (NCR) licensee from discharging or otherwise discriminating against an employee who has engaged in any activity protected under the employee protection provisions of the Energy Reorganization Act, hereinafter ERA. An employee who believes that he or she has been discriminated against in violation of the Act may file a complaint within 30 days of the occurrence of the alleged violation with the Secretary of Labor. The employee protection provisions are implimented by regulations providing for investigation, hearing and disposition of such complaints, 29 C.F.R. Part 24, *et. seq.*

On July 27, 1987, Complainant, James R. Barnett, forwarded a complaint to the Secretary of Labor against his former employer, Tennessee Valley Authority (TVA), the Respondent in this matter. The Complainant asserted that he had been continuously harassed and intimidated by TVA officials and supervisors at the Browns Ferry Nuclear Plant, (BFNP), as a result of his reporting nuclear regulatory commission violations to the NRC and other United States governmental agencies. The Complainant further accused TVA of encouraging others to take part in the harassment and intimidation of him as punishment for "blowing the whistle." The complaint was received by the Department of Labor on August 3, 1987 (ALJX 1). On September 30, 1987, the Department of Labor, Employment Standards Administration Wage and Hour Division, notified Complainant that following an informal investigation, it could not substantiate his allegation that he was harassed and intimidated by supervisors and officials of Browns Ferry Nuclear Plant as punishment for the report he made to the Nuclear Regulatory Commission in previous years and because he filed a complaint with the Department of Labor on September 30, 1986.

On October 6, 1987, Complainant requested a hearing on this matter. As the Secretary of Labor implements the handling of complaints brought by employees under the ERA § 5851, this case was forwarded to the Office of Administrative Law Judges on October 23, 1987 according to 29 C.F.R. Part 24. Pursuant to a Notice of Hearing dated October 30, 1987, a formal hearing was held on November 24, 1987, in Florence, Alabama. Each party was afforded the opportunity to present evidence and argument at the hearing.

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Nine exhibits were offered into evidence as Administrative Law Judge Exhibits 1 through 9, ALJX 1 - ALJX 9, which were admitted without objection. No exhibits were offered into evidence by the Complainant. The Respondent offered into evidence eight exhibits, identified as TVA Exhibits 1 through 8, TVAX 1 - TVAX 8, which were admitted without objection.

The record was left open for 60 days to allow Complainant to take and submit the deposition of Mr. Charles Elledge (Tr. 6). On December 8, 1987, the Respondent notified this office that the Complainant no longer wished to depose Mr. Elledge. Therefore, the record was closed on December 18, 1987, and the parties were instructed to provide their closing arguments no later than January 18, 1988. Complainant submitted his closing argument on January 7, 1988; and the Respondent's was submitted on January 14, 1988.

The findings of fact and conclusions which follow are based upon my observation of the appearance and the demeanor of the eight witnesses who testified at the hearing, and upon an analysis of the entire record, statutory provisions, applicable regulations, case law and arguments of the parties.

Issues

The issues presented for resolution are:

1. Whether the Respondent is an "employer" within the meaning of the Act;

2. Whether the Complainant engaged in activities protected by the Act; and

3. Whether the Respondent discriminated against the Complainant by discharging or discriminating against him for engaging in conduct protected by the Act.

Position of the Parties

On October 26, 1987, the Complainant specifically asserted that he was forced to take the wrong welding test, and was erroneously graded on a welding test which he did not perform (ALJX 6). He further alleged that he was laid off three times in

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two weeks and then forced to work overtime; and lastly, Complainant stated that he was told several times that if he filed a complaint he would be fired (ALJX 6).

It is TVA's position that the Complainant was neither intimidated nor harassed while he was employed at BFNP in July September, 1987 and that his treatment was not related to any alleged reporting of safety violations to the NRC several years ago. Specifically, the Respondent argued that the management of BFNP had no prior dealings with the Complainant and had no knowledge of his prior involvement with the BFNP during his employment in July, 1987.

Stipulated Facts & Issues

On November 12, 1987, Respondent submitted a stipulated statement of facts and issues (ALJX 9). Therein, the parties agreed to the following facts and issues:

1. On June 23, 1987, the Browns Ferry Nuclear Plant Modifications Group (BF Mod), Division of Nuclear Construction, requested that TVA's Muscle Shoals Employment Office, (MSEO), hire a boilermaker welder on a temporary hourly appointment to replace temporarily a boilermaker welder who was recovering from an on-the-job injury. The reason for the requisition was not noted on either the requisition or on Complainant's employment papers. MSEO filled this requisition by hiring Complainant who was told to report to BFNP Modifications Group on July 1, 1987.

2. Complainant reported to BF Mod on July 1, 1987 and went to the TVA payroll. MSEO had not noted that his appointment was subject to passing TVA welding tests, although this had been noted on the requisition. This requirement was added to Complainant's form TVA 9880A, Appointment Affidavit and Conditions at Browns Ferry Nuclear Plant. After it was determined that Complainant was not currently certified to weld at a nuclear plant, he was given a welding test by John Butler. Complainant alleges that he was fully certified to weld at TVA.

3. Mr. Butler was instructed by Clayton Carpenter to test Complainant by having him weld a plate. Prior to this time, boilermakers had been tested by welding a pipe. Mr. Carpenter was relatively new to BFNP and had no prior dealings with or knowledge of Complainant. Complainant alleges that steamfitters,

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boilermakers, and iron workers were all tested with a pipe weld at BFNP. He alleges that this is still the practice and that he was singled out when he was given a plate weld as a test.

4. Complainant practiced for 1 1/2 hours, out of 2 hours allowed for practice, and started the test on July 1, 1987. He completed it on July 2. After he completed the test, Complainant was told he could either stay at the job or leave early and return on July 6, 1987, the next workday. He left early.

5. On July 6, 1987, Complainant reported to work and was told that he had failed the welding test and was going to be terminated. Complainant alleges that the proper identifying marks or stencils were not on the samples purportedly taken from his plate weld test and shown to the director of BF Mod, R.E. Young. He protested his termination to Judith Looney, a member of the BFNP Employee Concerns Program (ECP) staff. Later that afternoon, management decided to allow Complainant to be retested on a pipe weld.

6. On July 7, 1987, Complainant took the pipe weld test, finished it in less time than is usually required, and passed it. He reported for regular work on July 8. During the period between July 1 and July 8, Complainant was on the TVA payroll and was paid for his worktime.

7. The boilermaker welder whom Complainant was hired to replace returned to work after recovering from his injury sooner than had been expected. Accordingly, on or about July 24, 1987, Complainant was told that he would be laid off, since BF Mod had work for two boilermakers and now had three members of that craft. Complainant alleges that he was told again on July 27 that he would be laid off. He protested this layoff to Charles Elledge, head of BFNP ECP. Several days later he was told that the layoff had been cancelled.

8. Complainant alleges that he was never told that he was hired to temporarily replace an injured boilermaker. He claims that if this had been the case, he would have been employed on a 30- to 60-day appointment, rather than an 11-month, 29-day appointment. It is his, position that standard practice at BFNP was that hourly craft workers hired on 11-month, 29-day appointments were employed for at least the full period of the appointment. Complainant also states that shortly after his July

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layoff was cancelled, the boilermakers in BF Mod put in a lot of overtime, working 10 hours a day, 7 days a week.

9. By September 1, 1987, the work for the BF Mod boilermakers had been completed. Mr. Barnett was laid off, while the other two boilermakers, who had been on the job for over a year, received reduction-in-force notices. None of the three worked under these appointments after September 1, 1987.

10. Complainant believes that TVA has harassed and intimidated him because he reported to NRC several years ago that some BFNP managers had violated safety requirements.

Statement of Facts

The Complainant, James Barnett, is a boilermaker welder. In this capacity he has been employed by the Respondent on more than one occasion. Complainant described himself as a disabled veteran, with a 60% service connected disability (Tr. 19).

Prior to the Complainant's employment with TVA in July, August and September, 1987, there is evidence of record which indicates that the Complainant was either employed or considered for employment in 1982, 1983 and 1986. During the Complainant's 1982 tenure with TVA, he testified that he witnessed and reported several serious violations of the NRC and other governmental agencies (Tr. 9). Complainant was terminated with cause from Browns Ferry Nuclear Plant in November, 1982 (Tr. 138).

In June, 1983 Complainant was called back to BFNP, and hired by MSEO (Tr. 9, 10). After completing the hiring-in process, Complainant's clearance was cancelled and he

was not hired for the position (Tr. 9, 10). During the hearing, Complainant's testimony and memory were inconsistent as to when his clearance was cancelled (Tr. 74, 139).

Ms. Deborah Norton, an employment officer at the Division of Personnel at Browns Ferry Satellite Employment Office, was previously employed in the Muscle Shoals Employment Office in 1983 and was asked about the cancellation of Complainant's clearance (Tr. 80). She opined that Complainant's clearance was cancelled due to the nature of his previous discharge (Tr. 78). Mr. Steven Moss, a personnel officer at BFNP, was unable to explain why the Complainant's clearance was cancelled in 1983 (Tr. 24).

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The Complainant asserted that he was verbally harassed in 1983 when his clearance was cancelled. Ms. Norton recalled the Complainant telling her about the remarks made to him, however she testified that no one ever admitted to making the remarks (Tr. 78,82-84).

In June, 1986, Complainant testified that he and five other boilermakers went to Browns Ferry to be hired in, took the alcohol and drug test, and that he reported to work approximately four or five days later after being contacted by Ms. Norton (Tr. 11, 12). He stated that he was hired on a 60-day contract, and when he reported to work, Ms. Norton informed him that the job had been cancelled (Tr. 12, 38). As a result, the Complainant filed a complaint with the Department of Labor for harrassment and intimidation. Complainant testified that he was "told by several people up there that they was not going to let me come back to work at Browns Ferry because I had -- I had turned them in to the NRC." (Tr. 12). The Complainant's testimony is contradictory as to whether the June, 1986 incident involved the modifications or Maintenance Group of TVA (Tr. 14, 38, 129).

Ms. Norton testified that she hired the Complainant as a boilermaker in 1986 (Tr. 72). Complainant asked her why this contract was cancelled, however Ms. Norton responded that she was never given any information regarding the cancellation of the contract except that the requisition was made erroneously. She indicated that the requisition was made in error by an assistant while the manager, who normally would request the persons through personnel, was on leave. When the manager returned from leave, he asked that the contract be cancelled (Tr. 73).

Mr. Moss explained the circumstances surrounding the Complainant's June, 1986 contract. He stated that Mr. Lewis, then the plant manager, was not aware of the request for boilermakers until his discussion with Mr. Bramlett, the Browns Ferry personnel supervisor (Tr. 38). He recalled Mr. Lewis instructing Mr. Bramlett to cancel the requisition, and made a statement concerning his desire to look at the work and to determine if it was necessary to have the people come in (Tr. 38).

Complainant testified that he was paid for the cancelled contract and that his 1986 complaint was settled by TVA for an approximate sum of $8,000 and an agreement that he would be

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called back to work for the Respondent if jobs were available (Tr. 12, 73). Terms of the agreement provided that "TVA agrees to consider Complainant for any future employment opening for which he applies and for which TVA determines he is qualified without regard to his previous termination from Browns Ferry Nuclear Plant." (Tr. 19). Complainant agreed that the agreement did not guarantee him a position at any particular time or place (Tr. 19).

On July 1, 1987, the Complainant was hired as a boilermaker welder in the Modifications Group at Browns Ferry and worked in this capacity until he was laid off on September 1, 1987 (TVAXS 3, 4, 5 & 7, Tr. 20). In the interim, on July 27, 1987, Complainant filed a complaint with the Department of Labor (ALJX 1). Complainant asserted that he was harassed and intimidated on this job on the grounds that his employment contract was modified, that he was given the wrong welding test, and lastly, that he was laid off in violation of his employment contract.

In late June, 1987, the need arose for an additional boilermaker (Tr. 140, 143). This was the result of an injury sustained by a boilermaker, and it became necessary for him to leave the job and obtain medical care. Mr. Young identified Mr. Jerry McCullum as the injured boilermaker, who estimated that he would be gone from his job for five to six weeks. Therefore, a call for a replacement boilermaker was made (Tr. 143). Mr. Young stated that the replacement boilermaker had to be certified (Tr. 144). According to his testimony, Mr. Young did not know, or have any information on the Complainant prior to July, 1987 (Tr. 142, 143). Nor did he have any knowledge of the prior complaints made by Complainant to the NRC or Department of Labor (Tr. 157).

The hiring procedures and types of employment contracts implemented by TVA were discussed in detail during the hearing. Mr. Moss, Ms. Norton and Mercer Chason described the hiring procedure for craftsmen at Browns Ferry.

Ms. Norton and Mr. Chason both described the the requisition procedure at TVA and stated that the division management will examine the work to be done, estimate how long the job will take, designate the number of craftsmen needed and the qualifications that are required (Tr. 68, 69, 87, 89). Mr. Chason, an employment officer at MSEO, stated that once a request reaches

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the office, it goes to Ben Webb. Afterwards, the re-employment and veterans preference lists are checked to determine eligible candidates (Tr. 90).

Mr. Moss indicated that an employee's paperwork is routinely verified through comparison with the requisition (Tr. 25). He stated that on the Complainant's Form TVA 9880A, the statement that Complainant's appointment was subject to passing a TVA welding test for a nuclear plant was missing (Tr. 25, 27). According to his testimony, this omission was due to a mistake made by Bob Webb, a supervisor of the Muscle Shoals Employment (Tr. 41). This discrepancy was brought to Mr. Moss' attention, and Mr. Moss testified that he spoke to the Complainant about the need to put the statement on his paperwork to "make everything proper." (Tr. 25, 26). According to Mr. Moss' testimony, in the Complainant's particular case, the correction involved adding the statement that the Complainant's appointment was subject to passing the TVA welding test for nuclear plants (Tr. 27). Mr. Moss stated that a discrepancy does not occur often, but indicated that it has happened before (Tr. 26).

The TVA request form sent to MSEO requesting a boilermaker welder noted that a candidate's continued employment was subject to passing welding tests for nuclear plants, among other criteria (TVAX 1). The requisition form is dated June 23, 1987 (TVAX 1). The Complainant's Appointment Affidavit and Conditions, identified by Mr. Moss as Form TVA 9880A or the Complainant's employment contract, specifically listed the special appointment condition "Subject to passing TVA welding tests." (Tr. 56, TVAX 2). The form indicates that B. E. Webb signed the affidavit on June 25, 1987 and that the Complainant reported to the Employment Office on June 25, 1987, and completed processing there on June 30, 1987 (Tr. 56, TVAX 2).

Mr. Chason indicated that a Form 9880 would not show a prospective employee the welding test requirement; however the request for candidates would (Tr. 92). Mr. Chason stated that he did not know why the test requirement was not on the Complainant's 9880A when the request came in (Tr. 93). According to Mr. Chason's testimony, once a candidate is selected, then the next step in the hiring in process is to check clearance (Tr. 94).

Complainant asserts that his July 1, 1987 employment

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contract with TVA was not fulfilled. Complainant's Form 9880A evidences that the type of appointment was considered a trades and labor temporary operating and maintenance hourly position, not to exceed past 88 06 23 (TVAX 2). Complainant identified this type of contract as an 11 month 29 day contract (Tr. 10).

Mr. Moss described the types of contracts that are used when hiring temporary help (Tr. 21). He stated that in almost all of the cases in the Modifications Group he is told to use an 11 month 29 day contract, unless it is known that the job will last for a definite

period of time (Tr. 22). He indicated that there were times when 30, 60 and 90 day contracts were, used, but that this was seldom done in the Modifications Group (Tr. 23). According to Mr. Moss' testimony, an 11 month 29 day appointment does not guarantee the length of employment, and that there is no minimum amount of time that one can be employed under this type of contract, however, the appointment cannot exceed 11 months and 29 days (Tr. 64, 65). Mr. Chason testified that the managers of the various organizations make the decision as to what type of contract a person will go on, and as to the length of the contract based on their estimate of how long they think the particular job will last (Tr. 87). Mr. Young also stated that an 11 month and 29 day contract was not a guarantee of any particular period of employment (Tr. 157, 162).

As far as the specifics of the Complainant's contract were concerned, Mr. Young opined that from the instructions that were given Personnel on the type of person that was needed, it was unusual that they would have hired someone on an 11 month 29 day contract to take the place of someone who was only going to be gone five or six weeks (Tr. 161). Mr. Moss testified that he did not know why the Complainant was hired on an 11 month 29 day contract, but to the best of his knowledge, it was unknown how long the injured worker that the Complainant was filling in for would be off. In his opinion, if the 11 - 29 contract was used, the contract would not have to be extended after 30 days and then another 30 days (Tr. 33). He stated that the 6/23/88 contract end date showed what was the maximum end date or the very latest date that the Complainant's contract was valid through. Mr. Moss testified that the end date did guarantee the Complainant employment beyond June 23, 1988, unless his services were needed by TVA (Tr. 33).

Mr. James Jackson, a weld test supervisor at Browns Ferry

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since 1981, stated that there is a standard test for each craft person to pass when they are hired in at BFNP (Tr. 99). He identified this procedure as a performance qualification test that must be passed (Tr. 99). According to his testimony, boilermakers take a six inch heavy wall pipe test as standard procedure (Tr. 99, 100). If a welder fails a welding test, the standard procedure at BFNP is that he cannot be retested for 30 days, and the welder is sent back to the union hall for this period (Tr. 102). Mr. Moss indicated that when a welder is hired at BFNP and there is a statement on his contract that his appointment is subject to passing a welding test, the employee is routed to the weld test instructor, who makes the determination as to the testing (Tr. 29). According to Mr. Moss' testimony, welding instructors, not TVA personnel, set the standards for the welding test (Tr. 30).

Mr. Jerry Campbell, a section supervisor at BFNP, in the Maintenance Group, stated that a boilermaker's entry test would strictly depend on where the employee would be working and the type of work for which he was needed (Tr. 128, 130). Mr. Campbell described the tests which he chooses to utilize, and stated that a hire-in test usually consists of a five inch heavy wall test (Tr. 128). Mr. Young indicated that at BFNP

employees are tested depending on the kind of work they will do, and that the test will be comparable (Tr. 145).

It is the Complainant's opinion that he was harassed during the testing procedures at BFNP (,Tr. 58, 59). Complainant testified that upon returning to Browns Ferry on July 2, 1987 he was given the wrong welding test, which he asserted had never been done before to a boilermaker (Tr. 10). This test was administered by John Butler, as Mr. Jackson testified that he was on vacation when the Complainant was given the plate test on July 2, 1987 and that he returned to work on July 6, 1987 (Tr. 42, 100, 103). According to his recollection, the Complainant was retested on July 7, 1987 (Tr. 104).

During the test, Complainant stated that he questioned Mr. Butler, the weld tester, why he was being given the plate test; however Complainant did not recall Mr. Butler's response (Tr. 139). Complainant stated that he failed the test, and asked to see the results. According to his testimony, the test results could not be identified by the number he had stenciled on it, and he has not seen the test results (Tr. 10). Complainant stated

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that Mr. James Jackson, the everyday welding instructor, informed him that he had not passed the test on the Monday following the test (Tr. 43). He further indicated that he did not see Mr. Butler again (Tr. 43). Complainant stated that he sat around all day on July 6, 1987, and on the following day, he was given the pipe test to complete which he passed (Tr. 44). Complainant went to Employee Concerns and spoke with Ms. Judith Looney (Tr. 46), and was eventually retested on the pipe test; which he passed.

Mr. Jackson had no idea why the Complainant was given the plate test, nor did he know whether the Complainant was a certified welder the last time he came to BFNP (Tr. 102, 107).

Mr. Moss opined that the Complainant was given the plate due to the fact that there were some new people involved in administering the welding test, and that the person who normally administered the test was on vacation (Tr. 30). He indicated that the Complainant was given the plate test because the weld test procedures were being changed, although he did not know whether these changes had been completed (Tr. 47). Mr. Moss testified that Complainant was retested because he felt that he had been given an incorrect test; and in an effort to correct the problem, and to give Complainant the benefit of taking the test which he thought was correct, he was allowed to take a second test, the pipe test (Tr. 31).

Complainant disagreed with Mr. Moss' statement that the test procedures were being changed (Tr. 49). However, Mr. Young testified that presently he was in the process of upgrading the BF Modifications welding program and that changes were being made as to the types of tests to be given, but no instructions have been issued to the welding test shop (Tr. 158).

Mr. Young testified that he did not know anything about the Complainant's certification when he came on board. He indicated that it was determined that the Complainant's qualifications were not in effect, so he had to be retested (Tr. 145).

Complainant questioned Mr. Moss why he was retested, asserting that he had been tested 20 to 25 days earlier on four different tests which were above the plate test (Tr. 28). Pertinent testimony on the Complainant's earlier testing was elicited from Mr. Jackson. He testified that a woman at the service shop told Mr. Jackson that the Complainant was certified on four different tests, but that in the process of giving the

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Complainant the requalification test that a "QC" person did not verify the requalification. Therefore, the Complainant was considered to have a fossil test and not a nuclear test (Tr. 115, 116). Mr. Jackson stated that a nuclear-facility has to document retesting to prove that a welder has continued his certification (Tr. 111).

Lengthy testimony was elicited from Mr. Young concerning the plate and pipe tests which the Complainant completed. He stated that boilermakers take both plate and pipe tests, and that the particular work that TVA had at the time Complainant was hired had to do with plate welding. Therefore, the Complainant was given the plate test (Tr. 145, 146). He opined that boilermakers probably weld less pipe on a nuclear facility than on a fossil plant due to the design differences (Tr. 146). In his opinion, the plate test is an appropriate test to give a boilermaker (Tr. 146).

Mr. Young admitted that the Complainant was given a different test than that which had been previously given to boilermakers (Tr. 146). However, he testified that at the plants where he had previously worked, the normal test to give a boilerwelder would have been the plate test, as very little pipe welding is done by boilermakers (Tr. 146). Not until the Complainant had been given the plate test, did Mr. Young learn that at BFNP the traditional test was the pipe test (Tr. 146). Mr. Young stated that this surprised him (Tr. 147), however he opined that the pipe test was an acceptable test, as either the pipe or plate test could be given. He was of the opinion that a pipe test was more time consuming, expensive, and more difficult. than the plate test (Tr. 147).

Mr. Young testified that he instructed the people at the test shop to retest the Complainant using the pipe test; as it was his experience that if a welder failed a plate test he would not pass the pipe test (Tr. 147) Since Complainant passed the pipe test, Mr. Young was satisfied that he was a good enough welder to go to work for TVA (Tr. 147). Prior to retesting the Complainant? Mr. Young recalled his conversation with Ms. Judith Looney from Employee Concerns (Tr. 147-149). At the time the Complainant was retested, Mr. Young stated that he had not met the Complainant, nor did he have any reason to give him a hard time (Tr. 149).

Upon the Complainant's satisfactory performance on the pipe

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test he was put to work as a boilerwelder for BFNP. On July 24, 1987, Complainant testified that he was called into the Personnel Office and informed that he was laid off because there was not enough work (Tr. 11). Complainant responded that his contract was for 11 months and 29 days (Tr. 11).

Complainant asked Mr. Moss why he was laid off, to which he responded that it was due to the fact that Mr. McCullum returned to work, and thus there was not sufficient work (Tr. 32). Complainant inquired as to why he was not hired on 30 or 60-day contract under these conditions, but Mr. Moss stated that he did not know for sure, but indicated that it was not known how long the injured employee would be off from work (Tr. 32, 33).

The lay off procedure was halted on July 24, 1987 and resumed three days later on July 27, 1987 (Tr. 33). Mr. Moss testified that the lay off procedure was stopped on July 24, 1987 when the Complainant discussed the situation with management, which wanted some time to review the situation before processing the Complainant on the 24th. On July 27, 1987, Division of Nuclear Construction management decided to proceed with the layoff on July 27th (Tr. 33, 34). Mr. Moss indicated that management wanted to ensure that Complainant had not been mistreated and that he was not singled out by any people who had known him in the past (Tr. 41). He further elaborated that there were new managers in the Modifications Group, including Mr. Young, and Mr. Moss attributed the unusual happenings there to the fact that they wanted to give the Complainant the benefit of an investigation before he was laid off (Tr. 41). Complainant testified that he was processing out on the 27th when he was informed that the layoff was cancelled (Tr. 34).

Mr. Young indicated that Mr. McCullum, the injured replaced boilermaker, came back to work in a little over, or a little less than two weeks; while it was originally believed that he would be off for five to six weeks (Tr. 150). At the time of McCullum's return, Mr. Young testified that there was only enough work for two boilermaker welders, and since the Complainant was low man, he was laid off (Tr. 150).

At the time of the layoff, Complainant went to Employee Concerns. This resulted in Mr. Charlie Elledge calling Mr. Young, and informing him that Complainant was there and felt that he had been treated unfairly and that he would like to talk to

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Mr. Young. Mr. Young went to Employee Concerns and met with the Complainant for the first time (Tr. 151). He testified that he spent quite a long time talking with the Complainant. This conversation concerned the Complainant's welding tests and whether Mr. Young had conspired to give the Complainant a different test, TVA's treatment of

disabled veterans, about the different personalities on the job and their feelings about the Complainant, and the Complainant's prior work at BFNP (Tr. 151).

In response to the Complainant's complaints about the layoff, Mr. Young testified that he discussed the situation with his supervisors in Knoxville and the Complainant's serious feeling about his employment contract (Tr. 152). Since there was meaningful work which could be found for the Complainant, Mr. Young stated that the decision was made to keep the Complainant as long as there were any boilermakers on the job (Tr. 152). Mr. Young testified that prior to July, 1987, he did not have any knowledge of the Complainant's prior complaints to the NRC, nor was he involved in those matters, and that none of the actions taken were based on the Complainant's prior involvement with the NRC or Department of Labor (Tr. 158).

Complainant asserted that during the layoff check out process he would go to the office and "all them girls giggling and laughing and carrying on, 'they getting rid of you again. 1 All this stuff, this humiliation, this intimidation, all the laughing and giggling and the managers sit up there with their little say. You know, each time, they got a full effect of harassing me on this. This is what I'm saying, they did that purposely, and when I'd go in like Medical, they would be there giggling and Steve -- Mr. Moss' office, all the secretaries around there would -- would start making fun of me, and laughing at me for this, their doings, not my doings." (Tr. 37). Mr. Moss testified that he was not aware of any of his secretarial staff making fun of the Complainant when he was checking out on July 24th and 27th, nor did he recall the Complainant making any such complaints (Tr. 66).

After the cancellation of the Complainant's layoff on July 27, 1987, the Complainant asserts that he was harassed and intimidated based on an increase in his work load. He testified that he was put on a 10 hour day, 7 days a week, and this occurred within a week after the July 27th layoff (Tr. 34, 79).

Mr. Young testified that after the Complainant's lay off was

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cancelled, that TVA was asked to increase the effort of work on the job to which the Complainant had been assigned, and that he had no idea that the schedule would be accelerated at the time of the layoff (Tr. 153). He stated that schedule acceleration was not an unusual occurrence, and that he did not learn of the overtime requirements until a week or two after the decision was made to keep the Complainant (Tr. 153).

Ms. Norton was unable to answer the Complainant's questions regarding his overtime nor speak for the division regarding the Complainant's post-July 27th schedule (Tr. 79).

Complainant admitted that at Browns Ferry most jobs end up with a lot of overtime (Tr. 18).

Complainant was laid off from BFNP on September 1, 1987 (TVAX 4). He was not sure whether the other two boilermakers with whom he worked with at the Modifications Group at BFNP were also let go on September 1, 1987 (Tr. 14). However, as demonstrated by TVAX 7 and TVAX 8, Jerry McCullum and Gerald Green were terminated from BFNP on September 1, 1987, along with the complainant (See also Tr. 154-156). According to Mr. Moss, the Complainant was terminated on September 1, 1987 because there was no further work needed (Tr. 62).

Complainant asserts that BFNP failed to complete their agreement when he was laid off on September 1, 1987 (Tr. 13).

Complainant testified that he has worked for TVA since September 1, 1987 at the Colbert Fossil Plant (Tr. 14). He subsequently testified that he went to work at Colbert in late September or the first of October, and identified the position as a five week job (Tr. 18). Complainant stated that there is no difference in pay as a boilermaker at Colbert or at Browns Ferry, rather it is the same hourly rate (Tr. 18).

The Complainant lastly asserts that he was discriminated against in the hiring process of two boilermaker welders at the BFNP in late September, 1987 (Tr. 13). Complainant testified that he was contacted by two or three people and informed about the hiring, that he was on the top of the out-of-work list, and therefore he was supposed to be the first boilermaker hired (Tr. 13). He claimed that BFNP found out that he was going to be one of the boilermakers due to his position on the out of work list,

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and therefore the order for boilermakers was cancelled (Tr, 125). Complainant learned that the positions were cancelled through the boilermaker local 455, of which he is a member (Tr. 16). Complainant testified that a week or so after this occurred, he was called to the Colbert Steam Plant, which is another part of TVA. After working at Colbert for a week or two, Complainant asserted that BFNP went on to hire the two boilerwelders (Tr. 13).

Initially, Complainant stated that the order for the two boilerwelders involved the Modifications Group, but later guessed that the work was part of the Maintenance Group (Tr. 15, 39). Mr. Moss identified the Maintenance Group as the division which was hiring the additional employees, including the two boilerwelders (Tr. 62). This is a different organization than the modifications Group.

One of the people identified by the Complainant as informing him of the boilermaker order was John Moore, a boilermaker employed by BFNP, although Complainant was unsure of whether he was part of the Modifications or Maintenance Groups (Tr. 16, 17). Complainant also identified Mr. Novice Murks as informing him of the position, Complainant identified Mr. Murks as one of the two boilermakers that were eventually hired by TVA (Tr. 17).

Mr. Moss stated that he was not aware that the Complainant was at the top of the out-of work list for boilermakers at the time the boilermaker order was placed (Tr. 40).

Jerry Campbell, a section supervisor at Browns Ferry in the maintenance Group for approximately three years, testified that in September, 1987, six men were hired on the intake job, two boilermakers, two steamfitters and two machinists (Tr. 118, 130). He stated that the boilermaker order was cancelled, and eventually went in a week to ten days behind the machinists order date, although the steamfitters order also went in late (Tr. 120). He was of the opinion that the majority of the work was steamfitters and machinists work (Tr. 121). Mr. Campbell indicated that he had never met or conversed with Mr. Murks before he came on the job (Tr. 127).

John Moore, who identified himself as a boilermaker at Browns Ferry in the Maintenance Group, testified that he had spoken with the Complainant before he went to work at Colbert

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concerning the hiring of two boilermakers (Tr. 132). He indicated that two boilermakers were hired after the Complainant went to work at Colbert (Tr. 133). Mr. Moore related a conversation that he had with Mr. Campbell about working with the Complainant which reflected positively on the Complainant (Tr. 133).

Conclusions of Law

The primary issue to be resolved in this case is whether the Complainant was terminated in retaliation for complaints he made about alleged safety violations under the ERA.

The Energy Reorganization Act states in pertinent part:

> § 5851. Employee Protection
> (a) Discrimination against employee. No employer, including a Commission licensee, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) ---
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or:
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other

action to carry out the purpose of this Act or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851.

Under the ERA, Section 5851, there are three basic elements

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of proof. The Complainant is required to demonstrate (1) that the party charged with discrimination is an employer subject to the Act; (2) that the Complainant was discharged or otherwise discriminated against with respect to compensation, terms, conditions, or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding under either the Energy Reorganization Act of 1974 or the Atomic Energy Act of 1954. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

Once the Complainant establishes a prima facie case of unlawful discrimination, the burden shifts to the Employer to prove by a preponderance of the evidence that, although part of the Employer's motive was unlawful, it was also motivated by the Complainant's unprotected activities and would have taken adverse actions against the Complainant in any event for the unprotected activities alone. The burden of persuasion then returns to the Complainant to show by a preponderance of the evidence that the Employer's reason are mere pretext. *Mt. Healthy City School District Board v. Doyle*, 429 U.S. 274 (1977); *Wright Line Inc.*, 251 NLRB 1083 (1980), *aff'd NLRB v. Wright Line, Inc.*, 662 F.2d 899 (lst Cir. 1981), *cert. denied*, 102 S.Ct. 1612 (1982); *Boich v. Federal Mine Safety and Health Review Commission*, 719 F.2d 194 (6th Cir. 1983); *Zebedo v. Martin E. Segal Company, Inc*., 582 F.Supp. 1394 (D.C. Conn. 1984)

The Energy Reorganization Act of 1974, prohibits a Nuclear Regulatory Commission licensee from discharging or otherwise discriminating against an employee who has engaged in activity protected by the Act. For the following reasons, I find that Complainant has failed to establish that he was engaged in protected activity during his 1987 employment tenure with BFNP, or that he was a whistleblower. Therefore, the procedures carried out by BFNP were not in violation of the ERA.

Based on the evidence of record, I find that the Respondent was and employeer and that the Complainant was an employee within the meaning of the Act and Regulations.

There is absolutely no evidence of record that the Complainant engaged, or was about to engage, in protected activities. No complaints concerning the public safety and welfare were contemplated or made by the Complainant. Rather he complained about the testing, lay off, and hiring procedures of

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Browns Ferry to Employee Concerns, and not the NRC. Furthermore, Complainant has cited no authority that he is entitled to protection based on a previous complaint to the NRC.

The Employer admitted that the Complainant was given a different test; however there is no evidence that the Complainant was singled out. The record reveals that Clayton Carpenter and Ronald Young were both relatively new managers at BFNP, and neither had any prior knowledge of the Complainant and his prior activities with TVA. It is clearly evident that all welders must pa§ a performance qualifications test, and according to Mr. Moss, this requirement and the discrepancy on the Complainant's form TVA 9880A concerning testing certification were brought to the Complainant's attention.

Complainant asserted that he was a certified welder, as of July 1, 1987. However, there is no affirmative evidence of record which establishes this fact. Mr. Young testified that it was determined that the Complainant's qualifications were not in effect; and this testimony was consistent with that of Mr. Jackson who indicated that the Complainant's requalification results were not verified by quality control.

Based on the testimony of Mr. Young and Mr. Jackson, I find that the Complainant was neither discriminated nor harassed when his welding abilities were tested before he started working for BFNP. The Respondent had a bona fide reason to test the Complainant, and as such I find that he was treated no differently than any other boilermaker welder employed by TVA in the Nuclear Power Division.

I further find that Complainant has failed to prove that he was discriminated against based on the fact that he was first given the plate test rather than the pipe test. Although traditionally the pipe test has been given at BFNP, there is no evidence of record that the plate test was an unfair determination of the Complainant's welding abilities. The overwhelming weight of the evidence clearly establishes that Ronald Young the Modifications Manager, Clayton Carpenter, a weld test supervisor, and John Butler, the weld test instructor, were was not aware of the Complainant's past with BFNP, nor his involvement with the NRC. Furthermore, Respondent headed Complainant's request to be retested, and even compensated Complainant during the testing period. Based on the above facts,

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I find that the Complainant has failed to relate the plate test to any discriminatory intent stemming from prior protected activity.

Complainant has failed to establish that he was harassed and intimidated by Respondent during the three layoffs which he experienced, and additionally asserted that his employment contract was not fulfilled. I find that there is absolutely no evidence that

Complainant was discriminated against in this regard. The evidence clearly establishes that regardless of the type of contract the Complainant was hired under, none guaranteed him a specified length of employment. The 11 month, 29 day contract merely established a date which Complainant's employment could not exceed. Furthermore, based on Mr. Moss' testimony, I find that the 11 month, 29 day contract was the type of contract typically used in the Modifications Group, and was the most logical contract to use in the Complainant's case since it was unknown how long Mr. McCullum would be off from work.

There is no evidence that the Complainant was discharged or laid off from BFNP on the grounds he participated in a proceeding under the ERA. The evidence clearly establishes that the proposed July 24th lay off was the result of Mr. McCullum's unexpected early return, and the proceedings on the 27th were a continuation of the earlier lay off halted by management. Complainant went to Employee Concerns, and his complaints were immediately recognized and considered by the Respondent. The evidence of record clearly demonstrates that the proposed layoff was the result of insufficient work and based solely on the Complainant's status as the boilermaker welder with the least seniority. Furthermore, upon consideration of the concerns voiced by Complainant, additional work was found for the Complainant and the layoff was cancelled.

Upon review of the Complainant's termination of specifically limited temporary appointment form, as well as Jerry McCullum's and Gerald Green's reduction of force notices, I find that the Complainant was neither harassed nor discriminated against when he was laid off by the Respondent on September 1, 1987. The Complainant, as well as his co-workers, lost their jobs because the work was completed. Complainant has failed to establish that there were any other intervening causes.

Complainant asserted that he was verbally harrassed by

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employees during the layoff procedures in July, 1987. Mr. Moss did not recall such treatment, nor any complaints made by the Complainant as such. As there is no affirmative evidence on this point, I find that the Complainant has failed to carry his burden of proof.

Complainant asserted that he was forced to work overtime, and that this was a form of harassment. Mr. Young testified that schedule acceleration was not unusual, and he indicated that he had no idea that the work load for boilermakers would increase when the Complainant's July lay off was anticipated. Complainant admitted that most jobs at Browns Ferry resulted in overtime; and there is no evidence that Complainant was treated any differently than any of the other boilermaker welders with whom he worked. No nexus has been demonstrated by the Complainant between any complaints previously

made to the NRC and the increase in his work load. Therefore, I find that Complainant has failed to establish that he was discriminated via an increase in his work load.

Although Complainant asserts that he was discriminated in regards to the late September, 1987 hiring of two additional boilermaker welders, I find that the evidence is insufficient to establish discriminatory intent. There is no affirmativ evidence that Complainant was on top of the out-of-work lists, nor does the evidence establish that the hiring was delayed based on the Complainant's position on the list. Furthermore, both the boilermaker welder and steamfitter contracts were delayed; and there is no evidence that this delay was in any way related to the Complainant and his prior protected activities under the ERA.

It is apparent that Complainant is unhappy with the terms of his contract, and his termination, however, such dissatisfaction does not entitle Complainant to a remedy pursuant to the ERA. There is absolutely no evidence that the Complainant was engaged in any protected activity during his employment with Respondent from July, 1987 to September, 1987; nor is there any evidence that the Respondent discriminated against the Complainant. As the Complainant has failed to establish that he was involved in a proceeding under the ERA or that he was discriminated against by the Respondent due to his participation in protected activity, I find that the Complainant has failed to carry his burden of proof. Thus, Complainant has failed to establish a *prima facie* case of unlawful discrimination under the Energy Reorganization

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Act.

Recommended Order

For the foregoing reasons, I recommend that the complaint of James R. Barnett be DENIED.

ROBERT L. COX
Administrative Law Judge